Supreme Court, U.S.
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In The
Supreme Court of the United States

ARTHUR C. WAGNER, JR., Individually
and for the benefit of Jean Marie Wagner,
Petitioner,

v.

LIVE NATION MOTOR SPORTS, INC.,
f/k/a SFX MOTOR SPORTS, INC., d/b/a
Clear Channel Entertainment-Motor Sports;
and Heartland Park Raceway, L.L.C.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The decision of the U.S. Court of Appeals for the Tenth Circuit in this matter arbitrarily and capriciously deprived plaintiff of his constitutional right to trial by jury guaranteed by the 7th Amendment, and further deprived him of a property or liberty interest protected by state law in violation of the Due Process Clause of the 5th Amendment. The Court of Appeals disregarded its statutory obligation under 28 U.S.C.A. § 1652 to apply the clearly announced law of Kansas in deciding whether the evidence was sufficient to support the jury's verdict.

STATEMENT OF PARTIES

The case in which petitioner is a party in United States District Court for the State of Kansas is *Arthur C. Wagner, Jr., Individually, and Arthur C. Wagner, Jr., for the benefit of Jean Marie Wagner v. Live Nation Motor Sports, Inc., f/k/a SFX Motor Sports, Inc., d/b/a Clear Channel Entertainment-Motor Sports; and Heartland Park Raceway, L.L.C., Case No.: 05-CV-2336-KHV-JPO* (filed Aug. 2, 2005).

1. *Arthur C. Wagner, Jr., Individually, and Arthur C. Wagner, Jr., for the benefit of Jean Marie Wagner v. SFX Motor Sports, Inc., et al., Case No.: 05-CV-2336-KHV-JPO* (filed Aug. 2, 2005), appeal docketed, Case No. 07-3365 (10th Cir. Jan. 9, 2008).

Plaintiff/Appellee/Cross-Appellant: Arthur C. Wagner, Jr., Individually, and Arthur C. Wagner, Jr., for the benefit of Jean Marie Wagner

Defendant/Appellant/Cross-Appellee: Live Nation Motor Sports, Inc., f/k/a SFX Motor Sports, Inc., d/b/a Clear Channel Entertainment-Motor Sports; and Heartland Park Raceway, L.L.C.

2. *Arthur C. Wagner, Jr., Individually, and Arthur C. Wagner, Jr., for the benefit of Jean Marie Wagner v. SFX Motor Sports, Inc., et al., Case No.: 05-CV-2336-KHV-JPO* (filed Aug. 2, 2005), appeal docketed, Case No. 07-3366 (10th Cir. Jan. 8, 2008).

Plaintiff/Appellee/Cross-Appellant: Arthur C. Wagner, Jr., Individually, and Arthur C. Wagner, Jr., for the benefit of Jean Marie Wagner

Defendant/Appellant/Cross-Appellee: SFX Motor Sports, Inc., d/b/a Clear Channel Entertainment-Motor Sports

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PETITION FOR A WRIT OF CERTIORARI

ARTHUR C. WAGNER, JR. individually and for the benefit of Jean Marie Wagner respectfully petitions for writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The decision of the Court of Appeals (App. A, 1a-22a) is reported at 586 F.3d 1237. Petitioner's Motion for Rehearing En Banc was denied by the Court of Appeals on December 7, 2009. (App. D, 81a-82a). The relevant District Court for the District of Kansas opinions are:

1. *ARTHUR C. WAGNER, JR. Individually and for the benefit of Jean Marie Wagner v. SFX Motor Sports, Inc., et al.*, (App. B, 23a-56a) which is reported at 460 F.Supp.2d 1263; and

2. *ARTHUR C. WAGNER, JR. Individually and for the benefit of Jean Marie Wagner v. SFX Motor Sports, Inc., et al.*, (App. C, 57a-80a) which is reported at 522 F.Supp.2d 1330.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Tenth Circuit sought to be reviewed was entered on November 13, 2009. A timely petition for rehearing *en banc* was filed on November 24, 2009. The order denying the motion for rehearing *en banc* was entered on December 7, 2009. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 and Rule 13.3, because it is being filed within 90 days of the entry of the order denying rehearing *en banc*. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. U.S.C.A. Const. Amend. 5.
   Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation of Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without compensation.

2. U.S.C.A. Const. Amend. 7.
Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

3. 28 U.S.C.A. § 1652

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

Plaintiff Arthur Wagner was seriously and permanently injured during a motorcycle race run by defendants at Topeka, Kansas, when he struck an unprotected concrete barrier that should not have been present, and he and his motorcycle burst into flames. Racetrack workers made no attempt to douse the flames that consumed his clothing, despite being implored to help by witnesses.

Mr. Wagner sued the race promoter and racetrack operator (among others) under Kansas law to recover for his injuries and for his wife's loss of consortium. Jurisdiction in the district court was based

on complete diversity of citizenship, pursuant to 28 U.S.C. §1332.

The parties stipulated that the unprotected concrete barrier could have been relocated and would have been moved, if only Heartland Park had been asked to relocate it. The jury found that defendant SFX had acted wantonly in disregarding the threat posed by the barrier and/or in failing to respond properly to the crash and resulting fire. The jury found that defendant Heartland Park had not acted wantonly in failing to move the unprotected concrete barrier without being asked to do so by SFX. Judgment was entered for plaintiff against defendant SFX following a jury trial that resulted in a verdict for $2,585,867.53 of total damages.

A partial remittitur of damages was ordered at the request of defendant SFX, but motions seeking judgment as a matter of law or a new trial were denied. SFX appealed, and plaintiff filed a cross appeal to challenge the remittitur.

The U.S. Court of Appeals for the Tenth Circuit reversed the jury's verdict and the judgment of the district court outright and directed the entry of judgment for defendants as a matter of law. The Court of Appeals determined that the acts and omissions of SFX did not rise to the level of wanton conduct, even though two lower court judges and the jury had found more than sufficient evidence of wanton conduct to be present. That decision rendered the cross appeal moot.

REASONS FOR GRANTING THE PETITION

1. Certiorari must be granted to vindicate plaintiff's right to a trial by jury under the 7th Amendment.

This case presents an example of "blatant federal-court nullification of state law" of the sort prohibited by *Leavitt v. Jane L.*, 518 U.S. 137, 116 S.Ct. 2068, 135 L.Ed.2d 443 (1996), aggravated by the constitutional severity of the resulting impairment of plaintiff's rights. A clearly announced rule of state law, well understood by two lower court judges and another panel of the same Court of Appeals, has been ignored by three appellate judges who prefer to substitute an invented standard of law that is not recognized by the courts of any state. This Court should grant review because the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

The decision of the U.S. Court of Appeals for the Tenth Circuit violated plaintiff's 7th Amendment right to a trial by jury in accordance with the common law, because the Court of Appeals substituted the personal judgment of the three members of the appellate panel concerning the persuasive value of the evidence for the considered judgment of the jury on a matter that was plainly an issue of disputed fact. Two lower court judges examined the evidence and determined that there was more than sufficient evidence to permit a jury to decide the case. Without concluding that either lower court judge had mistakenly comprehended or applied the admittedly controlling precedent of a prior

decision, the members of the panel chose to disagree with their evaluation of the sufficiency of the evidence. No rational explanation or excuse for disagreement was given, and the appeal was decided as it would have been if the matter had been entrusted to the Court of Appeals as finder of fact.

The decision of the Court of Appeals to set aside the judgment disregarded clearly identified evidence relied upon by both lower court judges in their decisions denying judgment as a matter of law. The court's statutory and constitutional obligations to decide the case under Kansas law as previously announced, rather than under a hypothetical standard that the appellate court wished the law to be, were disregarded without justification under Kansas law. Because the evidence heard by the jury was undoubtedly sufficient under all prior precedent to support a verdict for plaintiff, it was error of constitutional magnitude to decide the case based on the idiosyncratic views of the appellate panel instead.

2. **Certiorari must be granted to vindicate plaintiff's rights to Due Process under the 5th Amendment.**

Plaintiff had a protected property interest in the judgment entered in the lower court. Those rights were arbitrarily and capriciously nullified by the Court of Appeals' unjustified application of its version of the law to the facts of record.

Under Kansas law a tort plaintiff has a vested property right in existing rules of law that cannot

lawfully be impaired through modification of rules of law without affording due process. This property interest exists even before the liability has been reduced to judgment. See ***Resolution Trust Corporation v. Fleischer***, 257 Kan. 360, 892 P.2d 497 (1995). Under Kansas law the operator of a race track has a legal duty to maintain proper protective barriers to prevent injury to business invitees in the event of a crash. See ***Marshall v. Heartland Park Topeka***, 274 Kan. 294, 49 P.3d 501 (2002). SFX Motor Sports, Inc. contractually assumed the duty to conduct the race safely in its track rental agreement with Heartland Park. Kansas law permits recovery of tort damages for breach of a contractual duty relating to safe operation of a race. The condition of the barriers surrounding the track was therefore the legal responsibility of defendant SFX Motor Sports, Inc.

The Court of Appeals invented a new principle of law that had never been contemplated by Kansas courts, and then applied that newly discovered principle in an arbitrary and irrational manner to conclude that the evidence of wanton disregard of plaintiff's safety was insufficient. Kansas law permits a finding of wanton negligence whenever circumstantial evidence establishes that the defendant either actually knew or should have known of a risk of serious harm, but then took no affirmative steps to materially reduce the risk of that harm. Passive inaction is sufficient to establish wanton conduct under Kansas law, according to ***Hayes Sight & Sound, Inc. v. ONEOK, Inc.***, 281 Kan. 1287, 136 P.3d 428 (2006), and ***Cerretti v. Flint Hills Rural Electric Co-op. Ass'n***, 251 Kan. 347, 366, 837 P.2d 330 (1992). Kansas law permits a finding of wanton conduct in respect of

one wrongful act even though other wrongful acts of the defendant might fall short of wanton conduct. See *Hawkinson v. Bennett*, 265 Kan. 564, 606-607, 962 P.2d 445, 475 (1998).

The Court of Appeals panel ruled that plaintiff failed to present sufficient evidence to avoid judgment as a matter of law, even though his evidence was superior to the evidence used to establish precisely the same claims in *Wolfgang v. Mid-American Motorsports, Inc.*, 898 F.Supp. 783, 788 (D.Kan. 1995) *aff'd* 111 F.3d 1515 (10th Cir. 1997), a case which has been recognized as an exemplary decision and has been cited as authority scores of times by the 10th Circuit Court of Appeals. The panel opinion in this case did not seek to distinguish *Wolfgang* or explain why it was not controlling precedent on the issue of plaintiff's burden of proof, and inexplicably refused to follow that precedent. The conflict can only be resolved by the Court of Appeals sitting *en banc*, because no panel of the Court has the authority to reverse a prior published decision on the merits. See *Thompson v. Weyerhaeuser Co.*, 582 F.3d 1125 (10th Cir. 2009); *United States v. Hernandez-Rodriguez*, 352 F.3d 1325, 1333 (10th Cir. 2003). Circuit Courts of Appeal are not free to ignore their own rules, and arbitrarily decide a case as though the rule can be amended on a whim. See *Hollingsworth v. Perry*, __U.S.__, 130 S.Ct. 705 (2010).

Both in their District Court briefs and in their appellate briefs, all parties agreed that the *Wolfgang v. Mid-American Motorsports, Inc.* case was the precedent that governed the resolution of most of the issues on summary judgment and on post-trial motion

for judgment as a matter of law. Both the judge who decided the summary judgment motion and the trial judge agreed that the *Wolfgang* case was the single most relevant precedent establishing the substantive standard for liability and the minimal evidence needed to satisfy plaintiff's burden on proof. The published decisions denying summary judgment to defendants and denying the post trial motion for judgment as a matter of law acknowledged the obvious controlling relevance of the *Wolfgang* case. See *Wagner v. SFX Motors Sports, Inc.*, 460 F.Supp.2d 1263 (D.Kan. 2006) and *Wagner v. SFX Motor Sports, Inc.*, 522 F.Supp.2d 1330 (D.Kan. 2007).

The relevance of the *Wolfgang* case is obvious. Both cases involve traumatic burn injuries to professional racers suing the race promoters for wanton failure to take effective measures to put out the fire on their bodies that ensued when a crash occurred. The present case also involves severe and disabling additional impact injuries resulting from Mr. Wagner's collision with an unprotected concrete barrier that should not have been present. The facts in the present case are more egregious than those established in *Wolfgang*, because in that case there was at least a token effort to put out the fire, while here there was literally nothing done - Mr. Wagner was permitted to burn until the fuel from his ruptured fuel tank was fully consumed. The evidence employed in this case was more one-sided than the evidence in the *Wolfgang* case, because plaintiff's expert's testimony on the issues of wantonness and obviousness of the hazards was unrebutted.

Counsel for plaintiff carefully marshaled the evidence to be sure that the case presented was superior in every detail to the evidence that had been declared to be sufficient in the *Wolfgang* case. Because nothing has occurred to cast doubt on the continuing validity of the *Wolfgang* case as precedent, it would have been clear error for the lower court to grant judgment as a matter of law. It was similarly clear error for the panel in this case to ignore the unimpeached precedent of the *Wolfgang* case. *Wolfgang* is still a correct statement of Kansas law. Neither party sought to certify the controlling legal standard from *Wolfgang* to the Kansas Supreme Court. Defendants filed a motion to certify other issues to the Kansas Supreme Court, but did not seek to challenge the substantive test of liability or the burden of proof and instead limited their motion to subsidiary issues concerning alleged comparative fault defenses.

The panel failed to apprehend and apply the clearly controlling *Wolfgang* case. The decision references *Wolfgang* superficially while ignoring its importance. Judge Vratil, Magistrate Judge O'Hara, and all parties, obviously considered the case to be controlling but the panel did nothing to distinguish *Wolfgang* or explain why it did not control. If the panel had directly addressed the significance of *Wolfgang*, the obvious conclusion would necessarily have been that the lower court judges were correct to conclude that it was the controlling precedent. The failure to distinguish the *Wolfgang* case is strong evidence that the panel comprehended that it could not be distinguished in any rational way.

The panel overlooked substantial and overwhelming evidence when it concluded that plaintiff failed to offer sufficient evidence to meet the burden of proof of wanton conduct under Kansas law. The law does not require that the defendant expressly admit that a racer has been intentionally sacrificed like a gladiator to thrill the crowd. When a fairly obvious danger is present, and the defendant does no more than offer an ineffective and token response to the danger, liability is well proven under Kansas law. The witnesses who testified for SFX admitted that they had made a conscious but tragically erroneous decision to forego padding or moving the exposed concrete wall, which was in effect a confession of wantonness under prior Kansas cases like the *Hayes Sight & Sound, Inc. v. ONEOK, Inc.* and *Cerretti v. Flint Hills Rural Electric Co-op. Ass'n*, decisions, *supra*. They irrationally predicted that this accident could not happen, and they were wantonly wrong to do so. The panel's opinion fails to consider the facts in the light most favorable to the appellee as required by F.R.C.P. 50, and describes the evidence as defendants would have liked the jury to view it, not as they were free to do.

The reasoning employed in the panel's decision is not borrowed from any prior Kansas case. "Levels of risk" are not a part of the law of Kansas. There is no precedent for the conclusion that the promoter of a race can avoid liability merely by showing that some effort was made to protect racers against other hazards that were not involved in the accident or the injury. When a real risk exists, and is either actually known or fairly evident, a race promoter must do something effective to avoid harm from that risk.

Doing nothing, or hoping that efforts to protect against another risk will provide a shield against liability, will not suffice. There was substantial evidence of a failure to respond to a known or obvious risk, whether the analysis occurs on a general level or a specific level. The general risk of accidents at the unprotected barrier, located close to the fastest curve on the track, was ignored, as was the highly specific risk of allowing the racer to continue burning while the track workers stood idly by and watched it happen.

Even if the evidence had failed to establish wanton failure to remove or at least pad the concrete barrier, that fact would not excuse the wanton failure to do anything to put out the fire. Standing by passively and watching a fellow human being burn alive is ordinarily considered to be evidence of actual malice, not just wanton disregard. Even a total stranger deserves some effort to douse the flames that are consuming him. The direct testimony of one of the race workers who failed to put out the fire confirmed that neither he nor the only other worker who had a fire extinguisher did anything at all to douse the flames that covered Mr. Wagner. If that conduct does not rise to the level of wantonness, then there is no such thing as wanton conduct. The refusal of the Court of Appeals to acknowledge these damning facts is most disturbing, and strongly indicative of a desire to reach an arbitrary result that is unrelated to the facts of the case. It cannot be squared with the rule of *Hawkinson v. Bennett*, permitting a finding of wanton conduct as long as any wrongful omission met the test of conscious disregard, despite care in some other aspect of the case.

CONCLUSION

The petition for a writ of certiorari should be granted and the matter remanded to a different panel of the U.S. Court of Appeals for the Tenth Circuit. The U.S. Court of Appeals for the Tenth Circuit should be directed to deny the relief sought by defendants resolving the case as a matter of law. A different panel of the U.S. Court of Appeals for the Tenth Circuit should be directed to proceed to address the merits of the cross appeal filed by plaintiff.

Respectfully submitted,

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